No. 89-53

Supreme Court, U.S.
FILED
SEP 11 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1989

MISSOURI DIVISION OF TRANSPORTATION, ET AL.,
PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

ROBERT S. BURK
General Counsel

ELLEN D. HANSON
Associate General Counsel

EVELYN G. KITAY
Attorney
Interstate Commerce Commission
Washington, D.C. 20423

QUESTIONS PRESENTED

1. Whether the Interstate Commerce Commission (ICC) has primary jurisdiction to determine whether the in-state movement of goods, after shipment from out-of-state sources, is part of continuous interstate transportation subject to ICC regulation under the Interstate Commerce Act.

2. Whether the ICC properly concluded that the described transportation of chemicals from points outside Missouri through a distribution point in St. Louis to other points in Missouri constitutes continuing interstate transportation.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	16
Appendix	1a

TABLE OF AUTHORITIES

Cases:

Andrew G. Nelson, Inc. v. *United States*, 355 U.S. 554 (1958)	2
Atlantic Coast Line R.R. v. *Standard Oil Co.*, 275 U.S. 257 (1927)	12, 13, 14
Baltimore & O.S.W.R.R. v. *Settle*, 260 U.S. 166 (1922)	10
Contractors Cargo Co. v. *United States*, 299 F. Supp. 287 (C.D. Cal. 1969), aff'd mem., 397 U.S. 39 (1970)	6
Federal Crop Ins. Corp. v. *Merrill*, 332 U.S. 380 (1947)	11
Franchise Tax Bd. v. *Construction Laborers Vacation Trust*, 463 U.S. 1 (1983)	10
George Transfer & Rigging Co. v. *United States*, 380 F. Supp. 179 (D. Md.), aff'd mem., 419 U.S. 1042 (1974)	6
Gray Lines Tour Co. v. *ICC*, 824 F.2d 811 (9th Cir. 1987)	6
Jones Motor Co. v. *Pennsylvania Public Utility Comm'n*, 361 U.S. 11 (1959)	6
Louisiana Pub. Serv. Comm'n v. *FCC*, 476 U.S. 355 (1986)	9

Cases—Continued: Page

Merchants Fast Motor Lines, Inc. v. *ICC*, 528 F.2d 1042 (5th Cir. 1976) 6
Merrell Dow Pharmaceuticals Inc. v. *Thompson*, 478 U.S. 804 (1986) 10
Mullane v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) 11
North Carolina Utilities Comm'n v. *United States*, 253 F. Supp. 930 (E.D.N.C. 1966) 13
Pennsylvania R.R. v. *Public Utilities Comm'n*, 298 U.S. 170 (1936) 14
Public Serv. Comm'n v. *Wycoff Co.*, 344 U.S. 237 (1952) 10
Puerto Rico Maritime Shipping Auth. v. *Valley Freight Systems, Inc.*, 856 F.2d 546 (3d Cir. 1988) 8, 9
R-C Motor Lines, Inc. v. *United States*, 350 F. Supp. 1169 (M.D. Fla. 1972), aff'd mem., 411 U.S. 941 (1973) 6
Service Storage & Transfer Co. v. *Virginia*, 359 U.S. 171 (1959) 2, 5, 8, 10, 11
Texas & N.O.R.R. v. *Sabine Tram Co.*, 227 U.S. 111 (1913) 10
Texas v. *United States*, 866 F.2d 1546 (5th Cir. 1989) 7, 9, 11, 12
Vermont Yankee Nuclear Power Corp. v. *NRDC*, 435 U.S. 519 (1978) 11
Victoria Terminal Enterprises, Inc.—Transportation of Fertilizer Within Texas—Petition for Declaratory Order, No. MC-C-30002, served Feb. 3, 1989, pending review *sub nom. Steere Tank Lines, Inc.* v. *ICC*, No. 89-4114 (5th Cir.) 14
Weinberger v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609 (1973) 12

Statutes and regulations:

Communications Act, 47 U.S.C. 410(c) 9
5 U.S.C. 554(e) 2, 12
49 U.S.C. 10521(a)(1)(A) (1982 & Supp. V 1987) 2

Statutes and Regulations—Continued: Page

49 U.S.C. 10521(b) 2, 9
49 U.S.C. 10542 (1982 & Supp. V 1987) 14
49 U.S.C. 10921 2
49 U.S.C. 11701 (1982 & Supp. V 1987) 12
49 U.S.C. 11708 (1982 & Supp. V 1987) 12
49 C.F.R. Pts. 1101-1114 12

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-53

MISSOURI DIVISION OF TRANSPORTATION, ET AL., PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-9) is reported at 867 F.2d 458. The decisions of the Interstate Commerce Commission (Pet. App. 10-25, 27-40) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 41-42) was entered on February 3, 1989. A petition

for rehearing was denied on April 10, 1989 (Pet. App. 26-27). The petition for a writ of certiorari was filed on July 10, 1989 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 28 U.S.C. 2350.

STATEMENT

1. The Interstate Commerce Commission has regulatory jurisdiction over interstate transportation by motor carriers. 49 U.S.C. 10521(a)(1)(A) (1982 & Supp. V 1987). To conduct operations that are subject to ICC jurisdiction, a carrier must obtain an appropriate certificate from the ICC pursuant to 49 U.S.C. 10921. States retain authority to regulate wholly intrastate motor carrier transportation. 49 U.S.C. 10521(b).

The ICC is entrusted with authority to interpret the motor carrier certificates that it issues. *Service Storage & Transfer Co.* v. *Virginia*, 359 U.S. 171, 173 (1959); *Andrew G. Nelson, Inc.* v. *United States*, 355 U.S. 554, 558-559 (1958). Like other administrative agencies, the ICC possesses general authority to proceed by declaratory order. 5 U.S.C. 554(e); *Service Storage*, 359 U.S. at 177-178.

2. In July 1986, Matlack Inc. (Matlack) sought a declaratory order by the ICC concerning the scope of its ICC certificate. At the time, Matlack held motor contract carrier authority to transport general commodities between points in the United States under continuing contracts with manufacturers, distributors, and receivers of, among other commodities, chemicals and related products. Pet. App. 13. Matlack did not have any intrastate authority in the

State of Missouri.[1] Under contract with Chemtech Industries (Chemtech), Matlack transported bulk chemicals, which originated from points outside Missouri and which were brought to Chemtech's Missouri facilities by barge, rail, and motor carrier, from a Chemtech facility in St. Louis to ultimate destinations in Missouri and other states. *Id.* at 13-14. Matlack had received citations from Missouri officials on the ground that the movements within Missouri were intrastate and that Matlack did not possess intrastate operating authority. *Ibid.*

In October 1986, acting on Matlack's request, the Commission instituted a proceeding and published notices inviting comment in the *Federal Register* and the *ICC Register*. Twenty-eight parties commented. Pet. App. 10.

In June 1987, the ICC issued a declaratory order concluding that the shipments which Matlack described were part of continuous interstate transportation (*Matlack I*, Pet. App. 10-25). The Commission first denied requests for discovery and an oral hearing, explaining that its decision would be "limited to the facts presented" (*id.* at 12), and that the order did not preclude challenges to Matlack's actual operations if Matlack's description was not accurate or if Matlack performed other services (*ibid.*). The Commission also noted that the State of Missouri had not participated in the proceeding. *Id.* at 15.

The Commission then addressed the merits. It stated that "the shipper's fixed and persisting intent at the time of shipment" is "[c]rucial to a determination of the essential character of a shipment" (Pet.

---

[1] Matlack has now obtained intrastate authority from the State of Missouri. Pet. 4 n.1.

App. 16-17), and observed that the "question of whether goods come to rest in a warehouse or other storage facility must be decided on a case-by-case basis." *Id.* at 18. The Commission concluded that several factors supported characterizing Chemtech's shipments as continuous interstate commerce: the shipments moved promptly from their out-of-state sources to their ultimate destinations; Chemtech usually knew, on the basis of supply contracts and sales arrangements, the final destination from the moment a shipment left its out-of-state origin; no manufacturing or processing took place at the initial in-state site; and the initial in-state site was a temporary storage facility that allowed Chemtech to convert large volume movements into smaller volumes. *Id.* at 17-20.

Several petitions for reconsideration were filed, including a petition to intervene and reopen by the Missouri Division of Transportation (MDOT) and a petition to reopen by the Alabama Public Service Commission. In December 1987, the Commission issued a second decision (*Matlack II*, Pet. App. 27-40). Noting MDOT's claim that it had not been aware of the proceedings despite the notices in the *Federal Register* and the *ICC Register*, the Commission granted MDOT's petition to intervene and considered its objections. Pet. App. 28-29. The Commission reaffirmed that discovery was unnecessary (*id.* at 31-33); responded to challenges to its jurisdiction by emphasizing that "[i]t is settled law that we have primary jurisdiction over the interpretation of federal motor carrier certificates" (*id.* at 34); and again concluded that Chemtech's shipments "constitute continuous movements in interstate commerce" (*id.* at 37).

3. The court of appeals upheld the Commission's decision in all respects (Pet. App. 1-9). It first affirmed that the Commission had jurisdiction over the issue. The court concluded that, under the established principles of *Service Storage* v. *Virginia*, *supra*, the question whether the in-state transportation of the chemicals, after shipment from out-of-state sources, represented part of a continuous interstate operation was "clearly within the ICC's jurisdiction in interpreting whether its certificate covers the transportation." Pet. App. 5. The court also affirmed the Commission's conclusion that the essential character of the transportation at issue was interstate. *Id.* at 6-8. Noting the narrow standard for judicial review of this kind of administrative determination (*id.* at 6), the court cited the Commission's findings about the factors supporting characterization of the shipments as part of interstate commerce (*id.* at 7-8) and concluded that the ICC's decision was not "arbitrary, capricious, an abuse of discretion, or unsupported by substantial evidence on the record as a whole." *Id.* at 8.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any court of appeals. Accordingly, further review is not warranted.

1. Petitioners principally object (Pet. 10-18) to the conclusion that the ICC had primary jurisdiction to hear and decide this case. Contrary to petitioners' contentions, however, the Commission's exercise of primary jurisdiction in this case was solidly grounded in the principles of *Service Storage & Transfer Co.* v. *Virginia*, 359 U.S. 171 (1959). In

Service Storage, this Court reversed a State's assertion of jurisdiction over what the State deemed to be intrastate movements by a motor carrier; the carrier possessed an ICC certificate for interstate commerce and claimed that the movements were authorized interstate movements. This Court held that "interpretations of federal certificates of this character should be made in the first instance by the authority issuing the certificate and upon whom Congress has placed the responsibility of action." *Id* at 177. *Service Storage* thus stands for the proposition that questions about the scope of an ICC certificate should be addressed in the first instance to the Commission.[2]

Petitioners contend (Pet. 11) that *Service Storage* and succeeding cases are not applicable because the transportation movements in those cases actually crossed state boundaries; in contrast, the present case involves a "single-state situation." This attempt to distinguish the *Service Storage* line of cases is unavailing for at least two independent reasons. First, petitioners' argument assumes the outcome of the

---

[2] See, *e.g.*, *Jones Motor Co.* v. *Pennsylvania Public Utility Comm'n*, 361 U.S. 11 (1959) (summarily reversing state court judgment on the basis of *Service Storage*); *Gray Lines Tour Co.* v. *ICC*, 824 F.2d 811, 815 (9th Cir. 1987); *Merchant's Fast Motor Lines, Inc.* v. *ICC*, 528 F.2d 1042, 1044-1045 (5th Cir. 1976); *George Transfer & Rigging Co.* v. *United States*, 380 F. Supp. 179, 185 (D. Md.) (3-judge court), aff'd mem., 419 U.S. 1042 (1974); *Contractors Cargo Co.* v. *United States*, 299 F. Supp. 287, 290 (C.D. Cal. 1969) (3-judge court), aff'd mem., 397 U.S. 39 (1970). See also *R-C Motor Lines, Inc.* v. *United States*, 350 F. Supp. 1169, 1171 (M.D. Fla. 1972) (3-judge court) ("[t]he structuring and interpretation of a certificate of public convenience and necessity is an exercise of the Commission's special expertise"), aff'd mem., 411 U.S. 941 (1973).

analysis: that the disputed movement is separate from, and not a continuation of, the first leg of the transportation (which clearly crosses state lines). As the United States Court of Appeals for the Fifth Circuit has pointed out in response to the same argument, a "judgment about the superficial merits of a claim goes to the proper disposition of the claim, rather than to jurisdictional authority to dispose of the claim at all." *Texas* v. *United States*, 866 F.2d 1546, 1552 (1989).

Second, as the Fifth Circuit has also pointed out, the issue in *Service Storage* (an in-state to out-of-state to in-state shipment) and the issue in this case (an out-of-state to in-state to in-state shipment) are "not as distinct" as petitioners contend: "In both cases, there is no doubt that the goods being transported have crossed state lines * * *. In both cases, the issue is whether the undisputed border crossings suffice to make certain portions of the journey * * * interstate rather than intrastate." 866 F.2d at 1552. No court has ever given *Service Storage* the reading urged by petitioners.[3]

---

[3] The recent opinion in *Texas* v. *United States*, 866 F.2d 1546 (5th Cir. 1989), is particularly noteworthy because of its close similarities to this case. Like the Eighth Circuit here, the Fifth Circuit unanimously concluded that the ICC's exercise of primary jurisdiction was proper. 866 F.2d at 1551-1554. On the merits, moreover, like the Eighth Circuit, the Fifth Circuit affirmed the standard employed by the Commission. *Id.* at 1556-1561. Dissenting in part, Judge Higginbotham explicitly distinguished the Eighth Circuit opinion and noted that the "ICC's reasonable general interpretation" was sufficient to decide this case. *Id.* at 1567 (Higginbotham, J., concurring in part and dissenting in part). Although the Eighth Circuit specifically mentioned the then pending Fifth Circuit case (Pet. App. 5 n.3), and despite its obvious rele-

Petitioners also maintain (Pet. 11-14) that the ICC's primary jurisdiction does not extend to questions concerning its own jurisdiction, and that, in this case, unlike *Service Storage*, the Commission is determining its own jurisdiction. It is settled, however, that an agency's "jurisdiction to determine whether it has jurisdiction is as essential to its effective operation as is a court's like power." *Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 627 (1973). Despite petitioners' disavowals, moreover, their objections would apply equally to *Service Storage* itself and to every application of *Service Storage*. In each case, the Commission is, in a similar sense, determining whether it has jurisdiction; a decision that particular movements are not within interstate commerce is a determination that the Commission does not have jurisdiction over the movements.[4] Petitioners' position thus conflicts with established principles of administrative law, and of the *Service Storage* doctrine in particular.[5]

---

vance, petitioners fail to address the subsequently issued Fifth Circuit decision.

[4] See, *e.g.*, *Service Storage*, 359 U.S. at 175 (Virginia had taken position that Service Storage's shipments were "clearly intrastate in character").

[5] Petitioners rely heavily (Pet. 12-14) on *Puerto Rico Maritime Shipping Auth.* v. *Valley Freight Systems, Inc.*, 856 F.2d 546 (3d Cir. 1988). *Puerto Rico*, however, is exceedingly weak authority for petitioners' position. First, *Puerto Rico* involves appellate review of a district court decision not to dismiss an action on primary jurisdiction grounds (a decision that, as the court of appeals noted, *id.* at 549, is reviewable only for an abuse of discretion), rather than review of an agency's exercise of primary jurisdiction, as in the instant case. Second, the language quoted at length by petitioners (Pet. 13) is an alternative holding; the party urging

Petitioners attempt to bolster their jurisdictional objections by arguing that the Commission's decision represents unauthorized preemption of state law (Pet. 15-16). Petitioners assert that the Commission's decision impermissibly preempts state regulation of intrastate transportation, and thus violates 49 U.S.C. 10521(b) and *Louisiana Pub. Serv. Comm'n* v. *FCC*, 476 U.S. 355 (1986). Once again, however, petitioners improperly assume their conclusion by resting their jurisdictional objection on the resolution of the substantive issue. In any event, nothing in *Louisiana Public Service*, which concerned the Federal Communications Commission's (FCC's) attempt to regulate the depreciation of concededly intrastate aspects of telephone plant and equipment, remotely suggests that the determination whether a particular subject is interstate or intrastate is itself an unauthorized preemption. To the contrary, the Court repeatedly cited the Communications Act provision that provides a process, under federal law, for allowing the FCC to make that determination. See *id.* at 369, 375 (citing 47 U.S.C. 410(c)); *Texas* v. *United States*, 866 F.2d at 1553 (distinguishing *Louisiana Public Service* from the ICC's exercise of primary jurisdiction).

---

dismissal on primary jurisdiction grounds had been dilatory about raising the issue, and that tardiness itself was sufficient to validate the district court's exercise of discretion. 856 F.2d at 549. Third, the court of appeals noted that primary jurisdiction had been exercised in a closely related case, *id.* at 549-550, and proceeded to use the agency's analysis in that case as the basis for its resolution of the merits. *Id.* at 552; see also *ibid.* (noting that the "rule of deference is fully applicable to an agency's interpretation of its own jurisdiction"). Finally, the *Puerto Rico* opinion simply does not address *Service Storage*, or the doctrine for which it stands.

Finally, petitioners argue (Pet. 14-18) that the decisions by the court of appeals and the Commission will interfere with state administration of transportation systems. However, the principle that particular in-state shipments may be part of the continuous movement of interstate commerce is hardly novel.[6] *Service Storage* itself, moreover, specifically emphasizes the importance of having the Commission, rather than the State, resolve questions about the scope of a certificate. 359 U.S. at 177-178. Petitioners' protests notwithstanding, the Commission's decision in this case was squarely within the mainstream of the *Service Storage* doctrine and represents no expansion of those settled principles.[7]

---

[6] See, *e.g.*, *Baltimore & O.S.W.R.R.* v. *Settle*, 260 U.S. 166 (1922) (movement of goods from Oakley, Ohio to Madisonville, Ohio is part of continuous movement of interstate commerce); *Texas & N.O.R.R.* v. *Sabine Tram Co.*, 227 U.S. 111 (1913) (movement of goods from Ruliff, Texas to Sabine, Texas is not intrastate).

[7] Petitioners also claim that the Commission's exercise of jurisdiction was improper for two other reasons: it was analogous to an impermissible federal removal (Pet. 19), and it was an abuse of discretion (*id.* at 19-20) that violated principles of federalism established in *Public Serv. Comm'n* v. *Wycoff Co.*, 344 U.S. 237 (1952). These points are similarly unavailing. The difficult "arising under" federal jurisdiction analysis at issue in cases like *Merrell Dow Pharmaceuticals Inc.* v. *Thompson*, 478 U.S. 804 (1986), and *Franchise Tax Bd.* v. *Construction Laborers Vacation Trust*, 463 U.S. 1 (1983), is obviously inapplicable. The Commission's declaratory order, and the petition for review in the court of appeals, were explicitly authorized by federal statutes. Far from representing an abuse of discretion, moreover, the Commission's decision to issue a declaratory order was perfectly consistent with the emphasis in *Service Storage* on the desirability of a declaratory order by the Commission. See

2. Petitioners also contend (Pet. 21-22) that the ICC should have provided MDOT with personal notice of the declaratory order proceeding. However, the *Federal Register* and *ICC Register* notices were accurate and complete and constituted legally sufficient notice to all interested persons. *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380, 384-385 (1947).[8] Twenty-eight parties participated in the initial proceeding, including petitioner Alabama Public Service Commission. Even if the notice had been somehow inadequate, moreover, MDOT clearly was not prejudiced in any way. It was permitted to intervene in *Matlack II* (Pet. App. 29), and the Commission fully considered its arguments (*id.* at 33, 34). In short, the State of Missouri had an adequate opportunity to participate in this proceeding.

3. Petitioners maintain (Pet. 22-24) that the Commission was required to permit depositions and to conduct an oral hearing and an extensive factual investigation. The Commission, however, has broad discretion in the conduct of its proceedings. See *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 524 (1978). To the extent that a hearing was required at all, the Commission's use of a "paper

---

Service Storage, 359 U.S. at 177-178; *Texas* v. *United States*, 866 F.2d at 1553-1554.

[8] The only case petitioners cite, *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), is inapposite. That case involved the inadequacy of an ad placed by a trust company in the back pages of a local newspaper (giving notice of a judicial settlement affecting numerous beneficiaries of a common trust fund) when the names and addresses of some of the beneficiaries were known. *Mullane* does not address the adequacy of governmental notice through publication in the *Federal Register* and *ICC Register*, and does not purport to upset or modify the holding in *Merrill*.

hearing," rather than oral testimony and argument, was entirely appropriate. *Texas* v. *United States*, 866 F.2d 1546, 1555 (5th Cir. 1989).[9] Particularly in view of the limited scope of the Commission's order —confined to the facts as presented, with an explicit statement that any party could institute proceedings to prove that the actual facts are different (Pet. App. 12, 32-33)—the Commission's determination not to permit extensive discovery was entirely reasonable. If petitioners (or any other parties) have evidence that Matlack is conducting its operations in a manner that is inconsistent with what has been described, they may file a complaint directly with the ICC under 49 U.S.C. 11701 (1982 & Supp. V 1987) (or with the appropriate federal district court under 49 U.S.C. 11708 (1982 & Supp. V 1987)). They would then have access to the hearing and discovery procedures that are available under the ICC's General Rules of Practice (49 C.F.R. Pts. 1101-1114).

4. Petitioners also challenge (Pet. 24-26) the Commission's substantive conclusion (Pet. App. 16-22, 35-37), affirmed by the court of appeals (*id.* at 6-8), that the disputed transportation is interstate in character. Petitioners maintain that the analysis conflicts with two precedents from this Court concerning rail shipments.

First, petitioners argue that *Atlantic Coast Line R.R.* v. *Standard Oil Co.*, 275 U.S. 257 (1927), compels a contrary result. They maintain that, except for the use of rail carriers instead of motor carriers,

---

[9] See also *Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 626 (1973) (industry argument "assumes an individualized hearing and adjudication as is common in regulatory proceedings. Section 554(e), however, does not place administrative proceedings in that straitjacket.").

the facts in *Atlantic Coast Line* are "virtually identical" to the facts of this case (Pet. 25), and that the Commission improperly focused on Chemtech, which was the "*receiver* of goods," rather than the shipper. *Id.* at 26 (emphasis in original). Both suggestions are incorrect. The facts in *Atlantic Coast Line* were far from identical to the facts considered by the Commission in this case. In *Atlantic Coast Line*, Standard Oil of Kentucky stockpiled large quantities of oil at seaboard facilities, and, with no fixed arrangements for subsequent movements, provided the oil to customers as the demand arose (275 U.S. at 265, 269); here, in contrast, from the outset Chemtech had specific arrangements to ship the chemicals to their ultimate destinations. Pet. App. 17-19, 36-37. Similarly, the Commission's characterization of Chemtech as the "shipper" responsible for the entire interstate movement was completely proper. The record before the Commission specifically indicates that it is Chemtech who causes the chemicals to be shipped on both legs of the transportation (*id.* at 45); this record amply supports the Commission's finding that there is a "continuity of the single interstate movement from the product's origin point (which is always outside Missouri) to Chemtech's customers." *Id.* at 19.[10] By contrast, the involvement of two separate shippers in movements to different destinations—the first to

---

[10] In *North Carolina Utilities Comm'n* v. *United States*, 253 F. Supp. 930 (E.D.N.C. 1966) (3-judge court), the court similarly relied on the intent of a North Carolina importer of goods who caused the shipment of goods to in-state docks and then on to ultimate in-state destinations. *Id.* at 936. In *Matlack II*, the Commission noted that the "reasoning and conclusions of *North Carolina* are equally compelling here" (Pet. App. 36), and considered the similarities in the cases. *Id.* at 36-37.

the point of temporary storage, the second from the point of temporary storage—necessarily broke the continuity of movement in *Atlantic Coast Line*. See 275 U.S. at 267, 269.

Second, petitioners claim (Pet. 25) that, under *Pennsylvania R.R.* v. *Public Utilities Comm'n*, 298 U.S. 170 (1936), shipments brought into the State by transportation not subject to ICC jurisdiction (such as barges, see 49 U.S.C. 10542 (1982 & Supp. V 1987)) are intrastate shipments. However, *Pennsylvania R.R.* does not apply here; in any event, this issue is not suitable for review in this case.

In *Matlack I*, the Commission concluded (Pet. App. 21-22) that, under the principles of *Pennsylvania R.R.* and subsequent ICC decisions, it could not regulate shipments that originated from exempt transportation, and that the States also could not regulate such shipments. In February 1989, however, in a separate proceeding,[11] the Commission revised its interpretation of the reach and effect of *Pennsylvania R.R.*, distinguishing between its jurisdiction over rail transportation (as in *Pennsylvania R.R.*) and its jurisdiction over motor transportation; the Commission explicitly overruled ICC cases to the contrary.[12] The Commission's position now is that it may

---

[11] See *Victoria Terminal Enterprises, Inc.—Transportation of Fertilizer Within Texas—Petition for Declaratory Order*, No. MC-C-30002, served Feb. 3, 1989, pending review *sub nom. Steere Tank Lines Inc.* v. *ICC*, No. 89-4114 (5th Cir.). A copy of the Commission's decision is attached as an appendix to this brief.

[12] In *Victoria Terminal*, the Commission clarified that *Pennsylvania R.R.* does not apply to motor carrier cases because the ICC's jurisdiction over rail and motor transportation is not coextensive. As the Commission explained (App.,

license and regulate any motor carriage that is part of interstate commerce, even if the Commission does not regulate the transportation at the moment it crosses state lines. The Commission's revised interpretation is currently under review in the court of appeals for the Fifth Circuit. *Steere Tank Lines Inc.* v. *ICC*, No. 89-4114.[13] In view of these circumstances, the instant case does not present an appropriate occasion for this Court to consider the Commission's revised interpretation.

---

infra, 3a), the distinction in *Pennsylvania R.R.* between "transportation" and "commerce" is necessary in the rail area, but is not pertinent in the motor area. The Commission pointed to important differences in the governing statutes (App., *infra*, 3a), and to precedents acknowledging ICC jurisdiction over motor carriage movements within a single state when goods arrive by ship from a foreign country. *Id.* at 4a.

[13] The Commission's opinion in *Victoria Terminal* was served on the same day that the court of appeals' panel opinion was issued (Feb. 3, 1989). In opposing petitioners' unsuccessful petition for rehearing in the court of appeals, the Commission defended the revised policy on the merits. C.A. Opp. to Reh'g 8-10.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. BURK
General Counsel

ELLEN D. HANSON
Associate General Counsel

EVELYN G. KITAY
Attorney
Interstate Commerce Commission
Washington, D.C. 20423

SEPTEMBER 1989

APPENDIX

INTERSTATE COMMERCE COMMISSION

DECISION

No. MC-C-30002

VICTORIA TERMINAL ENTERPRISES, INC.—
TRANSPORATION OF FERTILIZER WITHIN TEXAS—
PETITION FOR DECLARATORY ORDER

Decided: January 27, 1989

[Served Feb. 3, 1989]

Pursuant to 49 U.S.C. 10322(g)(1), we reopened this proceeding for the limited purpose of reconsidering that portion of our prior decisions relating to our jurisdiction over the ex-water motor movements involved in this case.[1]

In our prior decisions (served December 15, 1987 and April 29, 1988), we accepted (without analysis) the opponents' assertion that the Commission lacks jurisdiction over the single-State motor carrier movements that involve traffic having a prior bulk barge movement from an out-of-State origin. We then concluded that, even though the Commission lacks regulatory jurisdiction over such movements, it has the responsibility and expertise to determine whether those single-State movements constitute part of a

[1] On January 18, 1989, the United States Court of Appeals for the Fifth Circuit granted our motion for voluntary remand in Nos. 88-4001 and 88-4379, *Steere Tank Lines, Inc. v. Interstate Commerce Commission and United States of America*, to permit us to reconsider this issue.

continuing interstate transportation movement and hence are beyond the (intrastate) regulatory purview of the States.

The proposition that the ex-barge movements are not subject to Commission regulation was based in large part on a review board decision in *Behnken Truck Service, Inc., Ext.—Exbarge Traffic*, 103 M.C.C. 787 (1967). *Behnken*, in turn, was based upon a decision of the Supreme Court in *Pennsylvania Railroad Co. v. Public Utilities Commission of Ohio*, 298 U.S. 170 (1936). In *Pennsylvania*, the Court held that a single-State movement by rail was not part of interstate transportation (and thus could be regulated by the State) because the preceding movement into the State by private carriage was not "transportation" within the meaning of the Interstate Commerce Act.

In *Behnken* (and several earlier decisions), the *Pennsylvania* rationale was applied in determining that the Commission lacked jurisdiction over a single-State motor carrier movement of goods that had entered the State by an exempt move. The board felt constrained to this conclusion because:

> The Pennsylvania case made it clear that not all commerce is transportation; that transportation begins only when merchandise has been placed in the possession of a carrier subject to economic regulation. . . .

Behnken, supra, 103 M.C.C. at 796, citing *Motor Transportation of Property Within a Single State*, 94 M.C.C. 541 (1964).

Upon closer analysis, we believe the review board erred in the *Behnken* line of cases in applying the holding of *Pennsylvania*, regarding the extent of the

ICC's *rail* jurisdiction, to a determination of its *motor* jurisdiction. This conclusion is based on the original (pre-recodification) language of the Interstate Commerce Act setting forth the Commission's jurisdiction over these modes.[2]

In the *rail* area, the original Interstate Commerce Act conferred upon the ICC jurisdiction over the transportation by railroad (as pertinent here) "from one State . . . to any other State" (section 1(1)), but not rail transportation that is conducted "wholly within one State" (section 1(2)(a)).

By contrast, in the *motor* area, Congress granted the Commission jurisdiction over transportation "in interstate and foreign commerce" (section 202(a)) and reserved to the States the power to regulate "intrastate commerce by motor carriers on the highways thereof" (section 202(b)(1)). It defined "interstate commerce" as "commerce between any place in a State and any place in another State . . . whether such commerce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express, or water" (section 203(10)).

Thus, the distinction made in the *Pennsylvania* case between "transportation" and "commerce" is necessary in the rail area, but not in the motor area. The statute does not preclude the Commission from licensing and regulating *motor* carriage that is conducted in interstate commerce, even if it does not

---

[2] By Act of October 17, 1978, Pub. L. 95-473, 92 Stat. 1466, the Interstate Commerce Act was recodified. Section 3(a) provides that the recodification "may not be construed as making a substantive change in the laws repealed." *Atchison, T. & S.F. Ry. Co. v. United States*, 617 F.2d 485, 490 (7th Cir. 1980), *Trailer Marine Transport Corp. v. FMC*, 602 F.2d 379, 383 n.18 (D.C. Cir. 1979).

regulate the transportation at the moment it crosses State lines.

Moreover, logically the fact that the ICC does not regulate the water portion of the movement ought not to be a critical determinant of its jurisdiction over the motor portion. If the fertilizer in this case had come into Texas by ship from a foreign country, the Commission would not regulate its mode of entry. Yet in that situation it is well settled that the Commission could regulate the subsequent movement by motor carriage within a single State (so long as the continuity of movement is not broken). See, for example, *Long Beach Banana Dist. v. Atchison, T. & S.F. Ry. Co.*, 407 F.2d 1173 (9th Cir. 1969), *cert. denied* 396 U.S. 819; *North Carolina Utilities Commission v. United States*, 253 F. Supp. 930 (E.D.N.C. 1966) (3-judge court).

In sum, we believe that whether a particular motor movement is considered to be interstate or intrastate should not depend upon how the fertilizer being moved by truck within Texas happened to cross the State line.[3] Therefore, we expressly overrule the review board decision in *Behnken*.[4]

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

---

[3] Compare, *ICC v. Texas*, —— U.S. ——, 107 S.Ct. 787, 793 (1987) (ICC to determine the proper interrelationship of different modes of transportation and to impartially regulate competing modes).

[4] To the extent that the *Behnken* analysis might appear to have been reaffirmed in Ex Parte No. MC-182, *United States Department of Transportation—Petition for Rulemaking—Single State Transportation in Interstate or Foreign Commerce* (not printed) (January 28, 1987), and other cases, we disavow the statements made in those cases on this point.

It is ordered:

1. Our prior decisions in this case are modified to the extent set forth above.

2. This decision is effective on the date of service.

By the Commission, Chairman Gradison, Vice Chairman Simmons, Commissioners Andre, Lamboley, and Phillips. Vice Chairman Simmons and Commissioner Lamboley dissented with separate expressions.

NORETA R. MCGEE
Secretary

[SEAL]

VICE CHAIRMAN SIMMONS, dissenting:

I believe that the approach taken by the majority in overturning the *Behnken* precedent is arbitrary and capricious. The decision overturns *Behnken* without comment or notice. Furthermore, the majority's justification for doing so is unpersuasive. *Behnken* correctly relied on *Penn R. Co.* v. *Public Utilities Commission of Ohio*, 298 U.S. 170 (1936). There the Supreme Court established the proposition that when transportation within a single state has been preceded by out-of-state barge movements, commerce for ICC purposes does not actually begin until placed in the possession of a carrier subject to regulation by us. The contention that the *Pennsylvania* principle is triggered only when rail movements are involved has no basis in law. The principle applies equally to motor carrier movements preceded by out of state barge movements. Nor has Congress ever made such distinction either directly or by inference. Moreover, Congress had the opportunity to make its intentions clear and overrule *Behnken* with the pas-

sage of the 1980 Carrier Act. As the Supreme Court observed: "If the concept of transportation is in need of expansion, it is for the legislative department of the government to determine how great the change shall be". 298 U.S. 177.

COMMISSIONER LAMBOLEY, dissenting:

I do not agree with this attempt by the majority to bolster its original decision's jurisdictional basis. Additionally, and more fundamentally, I reaffirm my dissent to the ultimate holding of this case as stated in my dissenting separate expression to the decision served December 15, 1987.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1989 241699 00503